

PILLSBURY WINTHROP LLP  
WAYNE M. WHITLOCK #130163  
GERALD F. GEORGE #142573  
2475 Hanover Street  
Palo Alto, CA 94304-1114  
Telephone: (650) 233-4500  
Facsimile: (650) 233-4545

Attorneys for Petitioner  
Homestake Mining Company of California

State Water Resources Control Board  
Of the State of California

In the Matter of the Petition of

BARRICK GOLD OF NORTH  
AMERICA, INC. and HOMESTAKE  
MINING COMPANY OF  
CALIFORNIA

For Review of Order to Submit Technical  
Reports

California Regional Water Quality Control  
Board, Central Valley Region

No. \_\_\_\_\_

PETITION FOR REVIEW, REQUEST  
FOR HEARING AND REQUEST TO  
HOLD APPEAL IN ABEYANCE

Pursuant to Water Code section 13320 and Title 23 of the California Code of  
Regulations section 2050, Petitioners BARRICK GOLD OF NORTH AMERICA, INC.  
("Barrick") and HOMESTAKE MINING COMPANY OF CALIFORNIA ("Homestake")  
(together "Petitioners") hereby petition the State Water Resources Control Board ("State  
Board" or "SWRCB") for review of the California Regional Water Quality Control Board,  
Central Valley Region ("Regional Board") Risk Assessment Comments and Order to  
Submit Technical Reports ("Order") for McLaughlin Mine, issued November 8, 2005.

1 Petitioners request a hearing in this matter.

2 1. The names and addresses of Petitioners are:

3  
4 Barrick Gold of North America, Inc.  
5 136 E. South Temple, Suite 1300  
6 Salt Lake City, UT 84111

7 Homestake Mining Company of California  
8 26775 Morgan Valley Road  
9 Lower Lake, CA 95457

10 2. Petitioners request that the State Board review the Regional Board's Order  
11 issued to Petitioner Barrick relating to the McLaughlin Mine (the "Mine"), which is owned  
12 and operated by Petitioner Homestake. A copy of the Order is attached as Exhibit A.

13 3. The Regional Board issued the Order on November 8, 2005.

14 4. As set forth more fully in the statement of points and authorities set forth  
15 below, the Regional Board's Order is arbitrary, capricious and in violation of law and  
16 policy. Petitioners seek State Board review of the Order relating to the following issues:

17 a. Name of Party to which the Order was Issued. The Order was  
18 improperly directed to Rocky Chase, Manager, Closure Properties, Barrick Gold of  
19 North America, Inc. and improperly names Petitioner Barrick as the party subject to  
20 the Order. Further, the Order incorrectly states that "Barrick is the owner and  
21 operator or the site at which wastes were discharged." Order at 3. Homestake is a  
22 corporate affiliate of Barrick, which provides corporate services to Homestake.  
23 However, Barrick has not had, and does not have, any ownership or operating  
24 interest in the McLaughlin Mine. Homestake is a separate legal entity that has  
25 owned and operated the McLaughlin Mine, including all lands and facilities, since  
26 the Mine was initially permitted in 1985, and Homestake holds all the Mine's  
27 entitlements. The 2001 Waste Discharge Requirements (Order No. 5-01-168)  
28 ("2001 WDRs") and the 2004 Revised Monitoring and Reporting Program No. 5-

1 01-168 (“2004 Revised Monitoring and Reporting Program”) were properly issued  
2 to Petitioner Homestake, as the owner and operator of the McLaughlin Mine. 2001  
3 WDRs, ¶1 (attached as Exhibit B); 2004 Revised Monitoring and Reporting  
4 Program (attached as Exhibit C). It was not proper to name Barrick on the Order.

5 Petitioners Barrick and Homestake request that the State Board remove  
6 Barrick as the named party and, to the extent that the Order is rescinded or  
7 modified, direct all future actions to Homestake. Because Homestake is the proper  
8 party of any regulatory action regarding the McLaughlin Mine, including this Order,  
9 all further objections regarding the Order are discussed herein in the name of  
10 Homestake. However, in the event that the State Board denies Barrick’s request to  
11 be removed from the Order, Barrick joins with Homestake with regard to the  
12 remainder of the Petition.

13 b. Order to Prepare Alternative Mine Tailings Closure Plan. The Order  
14 improperly directs Petitioner Barrick to prepare a “revised Closure Plan and  
15 implementation schedule for the McLaughlin Mine tailings facility that complies  
16 with Sections 21090 (a-c) and 21400(a) of Title 27 California Code of Regulations.”  
17 Order at 3. This requirement is premised on the Staff’s improper and premature  
18 rejection of Homestake’s existing mine tailings closure plan, dated September 30,  
19 2001 (“2001 Closure Plan”) and the Staff’s assertion that a form of dry closure is  
20 the only closure method that it will accept and the Regional Board will approve.  
21 Homestake asserts that the Regional Board Staff’s preferred approach is entirely  
22 infeasible. Therefore, an alternative to the prescriptive approach of the regulations  
23 is not only appropriate but necessary to protect water quality and satisfy applicable  
24 legal requirements.

25 Further, the Order reflects that Staff has rejected the 2001 Closure Plan  
26 without considering relevant significant information currently being prepared by  
27 technical experts on behalf of Homestake for submission to the Regional Board.

1 After reviewing comments on the 2001 Closure Plan from Regional Board staff and  
2 other agency representatives, Homestake withdrew its reclamation plan amendment  
3 application from the formal review process and began an intensive, methodical,  
4 step-wise process to address the questions that had been raised. Homestake  
5 commissioned the preparation of a series of technical reports between 2001 and  
6 2004 to document Homestake's assessment of the wet alternative closure design for  
7 the mine tailings impoundment in addition to addressing the Regional Board's and  
8 other agencies' concerns regarding the closure. Each report builds upon the  
9 previous one. First, Golder Associates completed a Report of Mill Tailings  
10 Characterization, McLaughlin Mine on December 4, 2002. Based, in part, on  
11 information contained in this study, Golder Associates then completed its Report of  
12 Operational and Closure Water Balance Model Review, Tailings Impoundment,  
13 McLaughlin Mine on January 13, 2003. Information in these first two reports  
14 formed a basis for Geochimica's Geochemical Model for the McLaughlin Tailings  
15 Impoundment, Lake County, California, which assesses the chemical evolution of  
16 the tailings pond, and was completed in May 2004. Using each of these reports as  
17 its foundation, ENSR International completed an extensive report of ecological risk  
18 assessment at the mine tailings impoundment, in December 2004. ENSR  
19 International's report is titled McLaughlin Mine Ecological Risk Assessment, Final  
20 Report. Homestake representatives met with Regional Board staff to present the  
21 results of these studies at each appropriate stage of this iterative process.

22 Following submission of the December 2004 Ecological Risk Assessment,  
23 Homestake representatives met with the Regional Board staff in January 2005.  
24 Based on the results of the risk assessment and the January 2005 meeting,  
25 Homestake began to evaluate treatment options that could reduce risks identified in  
26 the Ecological Risk Assessment. The results of this effort will, in turn, provide the  
27 basis for refining the risk assessment for the closure plan, including incorporation of  
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1 mitigation measures, and establishing the feasibility of the Closure Plan as  
2 modified. The final step then will be the development of an engineered design of  
3 the modified Closure Plan.

4 To the extent that the Order reflects a rejection of the analytical approach  
5 described above and, instead, a demand for a prescriptive dry cover design,  
6 Homestake disputes the Order's assertion that Homestake had indicated that an  
7 "engineered alternative cover design would be submitted" as an outcome of the  
8 January 2005 meeting. Order at 1. Rather, Homestake understood from the January  
9 meeting that Regional Board staff had continuing reservations about the wet cover  
10 approach reflected in Homestake's 2001 Closure Plan. Based on that meeting,  
11 Homestake understood it would be necessary to complete and submit additional  
12 analysis to demonstrate the infeasibility of the dry cover approach and that  
13 additional risk evaluation and technical and engineering analysis of Homestake's  
14 wet cover alternative would be necessary to obtain Regional Board approval. Since  
15 then, Homestake has been developing that analysis in diligent pursuit of the  
16 Regional Board's approval. Given all the work Homestake has done since January  
17 2005 to address the concerns of the Regional Board staff, as well as the need to  
18 address the DTSC-HERD critique of the Ecological Risk Assessment (which was  
19 provided to Homestake for the first time as an attachment to this Order) an Order  
20 requiring Homestake to develop and submit a dry closure alternative plan is  
21 premature, and arbitrary and capricious. Furthermore, in light of these  
22 circumstances, the deadline imposed in the Order is entirely unreasonable for the  
23 submission of an engineered closure design—for either a wet or a dry closure plan.

1                   c.       Concerns about Mine Tailings Impoundment Ecological Risk

2                   The Regional Board attached a critique of the January 2005 Ecological Risk  
3                   Assessment for the Mine Tailings Impoundment prepared by the Department of  
4                   Toxic Substances Control—Human and Ecological Risk Division (“DTSC-HERD”).  
5                   The Order concludes that “a wetlands closure of the tailings will evolve into a salt  
6                   and metals dominated brine pond that will be toxic to wildlife” that is “an  
7                   unacceptable ecological risk.” Order at 1. Ironically, since January 2005  
8                   Homestake has been working diligently to update the ecological risk assessment and  
9                   respond to concerns raised earlier regarding ecological risk, and much has been  
10                  accomplished. The Regional Board’s conclusions regarding ecological risk are not  
11                  fully informed. This work indicates that the DTSC-HERD comments may be  
12                  addressed fully without rejecting Homestake’s wet closure plan. The Regional  
13                  Board’s action is premature, arbitrary and capricious.

14                 d.       Mine Pits Ecological Risk Assessment and Revised Management  
15                 Plan. The Order requires Barrick (rather than Homestake) to submit an Ecological  
16                 Risk Assessment Workplan for the McLaughlin Mine Pits by February 1, 2006,  
17                 complete the Ecological Risk Assessment by January 1, 2007, and submit a revised  
18                 plan to manage the Mine Pits that prevents surface water discharge and mitigates  
19                 any ecological/environmental hazards by June 1, 2007. The Order states that the  
20                 Regional Board is requiring the additional ecological risk assessment because  
21                 DTSC-HERD “has expressed concern that the pit waters *may be* an ecological  
22                 hazard to wildlife.” Order at 2 (emphasis added). However, the Regional Board has  
23                 provided no documentation of any concerns raised by DTSC-HERD regarding the  
24                 Mine Pits. The DTSC-HERD comments attached to the Order were made only in  
25                 regard to the Mine Tailings Impoundment. Further, the Regional Board Staff has  
26                 identified no water quality concern or threat to any beneficial uses or provided  
27                 Homestake with any other water quality basis upon which to conclude that this  
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1           costly and extensive risk assessment of the Mine Pits should be undertaken. In fact,  
2           Staff concedes that it “did not find a threat to surface water” and “there is no useable  
3           groundwater aquifer at McLaughlin Mine.” Id. Other than labeling Homestake’s  
4           2001 Ecological Review of Closed Mine Waste Units (July 16, 2001 McLaughlin  
5           Mine Closure Plan, Appendix 12) as “ cursory” the Order provides no reaction to  
6           Homestake’s 2001 analysis relating to the Mine Pits. Id. The Order’s requirements  
7           relating to the Mine Pits are, therefore, arbitrary and capricious.

8           5.       Petitioner is aggrieved by the Regional Board’s action. First, the Order  
9           improperly names Barrick as the party responsible to comply with the Order, even though  
10          Homestake is and has been the owner and operator of the McLaughlin Mine and holds all  
11          the entitlements, including Waste Discharge Requirements last issued by the Regional  
12          Board in 2001.

13          Second, the Regional Board rejects the 2001 Closure Plan before even considering  
14          all the information Homestake has been working over the past eleven months to develop  
15          and supplement the technical reports submitted on Homestake’s behalf since 2001. The  
16          Regional Board continues to insist on an entirely infeasible and unnecessary closure  
17          approach that would require the implementation of closure methods for the Mine Tailings  
18          Impoundment that are entirely unnecessary, impractical, infeasible and would not provide  
19          the level of water quality protection that the 2001 Closure Plan would provide under the  
20          unique circumstances involved here.

21          Third, the Order imposes duplicative and unnecessary requirements. Homestake has  
22          worked diligently to update the draft ecological assessment for the Mine Tailings  
23          Impoundment and address technical issues related to closure of that impoundment under its  
24          current proposal. That work will form the basis for an engineering design that will address  
25          all the concerns raised and satisfy all applicable legal requirements. Requiring  
26          development of a whole new dry alternative closure plan at this stage of Homestake’s work  
27          to respond to Staff’s previous input would be entirely unreasonable.

1 Fourth, the Order's Ecological Risk Assessment requirements relating to the Mine  
2 Pits impose a heavy regulatory burden without adequate justification.

3 Fifth, aside from the impropriety of the Order's substantive requirements, its  
4 deadlines are unreasonable and difficult, if not impossible, to achieve consistent with  
5 developing a competent work product. Finally, even though Homestake has made every  
6 effort to comply with the Regional Board's requirements, it (as well as Barrick because it is  
7 improperly named) remains subject to the imposition of penalties should the Regional  
8 Board believe that Homestake has not complied with the Order.

9 6. Petitioner requests that the State Board revoke the Regional Board's Order  
10 and specifically order the following:

- 11 a. To the extent that the Order remains in effect based State Board review,  
12 remove Petitioner Barrick as the party named by the Order and address it to  
13 Homestake.
- 14 b. Rescind the requirement to submit a new alternative Mine Tailings Closure  
15 Plan and require the Regional Board to consider the information Homestake  
16 is preparing for submission to the Regional Board in response to Staff's  
17 concerns before taking further action;
- 18 c. Rescind the requirements to submit an Ecological Risk Assessment  
19 Workplan for the Mine Pits, to conduct that additional risk assessment, and  
20 to submit a revised management plan following the risk assessment; and
- 21 d. If any of the Order's requirements are to be modified rather than revoked,  
22 the deadlines should be extended to follow after the completion of the  
23 pending submissions.

24 7. A copy of this Petition is being sent by Federal Express to the Regional  
25 Board on December 8, 2005, to the attention of Thomas R. Pinkos, Executive Officer.

26 8. Homestake had addressed many of the substantive issues that are the subject  
27 of this appeal in previous discussions with the Regional Board Staff during the closure plan  
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1 review process. However, given Petitioner's efforts to respond to Regional Board input  
2 since January 2005, Petitioner was surprised by this Order and there was not adequate time  
3 to meet and resolve these issues before the time for filing this appeal runs. Therefore this  
4 petition is being filed to protect Petitioner's interests in the event that the issues cannot be  
5 resolved by further discussion. Petitioner wishes to continue to work with Regional Board  
6 Staff to pursue resolution of this very serious matter. Accordingly, Petitioner requests that  
7 the State Board hold this appeal in abeyance pending the outcome of further meetings with  
8 the Regional Board and its Staff.

9  
10 9. In the event that it becomes necessary to pursue this appeal, Petitioners  
11 request a hearing in this matter and reserve the right to request an opportunity to present  
12 additional evidence that might later come to light. In addition, Petitioner intends to submit  
13 a Petition for Stay of the Order pending Petitioner's appeal should it become necessary to  
14 pursue the appeal.

15 10. The State Board's regulations require submission of a memorandum of  
16 points and authorities in support of the legal issues raised in a petition. 23 Cal. Code Regs.  
17 § 2050(a)(7). Petitioner's statement of points and authorities in support of the issues raised  
18 by this Petition commences below. However, because the complete administrative record  
19 in this matter is not yet available, it is not possible to prepare a thorough memorandum.  
20 Therefore, this document is intended to serve as a preliminary memorandum and Petitioners  
21 reserve the right to supplement this memorandum when the administrative record and other  
22 materials become available.

### 23 STATEMENT OF POINTS AND AUTHORITIES

24 Petitioners incorporate Paragraph 4 as their basis for this appeal, request for hearing,  
25 and request to hold the appeal in abeyance. In addition, Petitioners further state that the  
26 basis for their appeal and requests is that the November 8, 2005 Order contains  
27 requirements that are (1) arbitrary and capricious; (2) unsupported by technical and  
28

1 scientific evidence; and (3) inconsistent with State Board rules and policies.

2 I. BACKGROUND.

3 This Order relates to the efforts of Homestake to develop and provide necessary  
4 technical support for a closure plan for its Mine Tailings Impoundment that complies with  
5 all applicable legal requirements, is fully protective of water quality and wildlife and is  
6 feasible. Regional Board Staff has had ongoing concerns with Homestake's proposed 2001  
7 Closure Plan, which was submitted pursuant to the requirements of the 2001 WDRs issued  
8 to Homestake. 2001 WDRs, ¶ 35. However, Homestake was surprised by the Regional  
9 Board's November 8 Order in light of its ongoing efforts to address the concerns raised in a  
10 January 2005 meeting between Regional Board Staff and Homestake representatives.

11 Homestake Mining Company's McLaughlin Mine, located in Napa, Lake and Yolo  
12 Counties, California, has been operating since 1985. The mine's original Reclamation Plan  
13 was approved by each of the Counties in 1983 and 1984 before the mine was put into  
14 production. Mining operations concluded in 1996, processing operations concluded in  
15 2002, and reclamation pursuant to the approved reclamation plans began to be  
16 implemented. Many reclamation activities have been successfully completed, such as  
17 recontouring and revegetation of mined areas and removal of mill facilities. The end use  
18 of this site is to provide research and instructional opportunities in science, environmental  
19 management and mining engineering at a University of California Davis environmental  
20 studies research station.

21 In September 2001, Homestake submitted an amended closure plan (the 2001  
22 Closure Plan) to a number of agencies, including the Regional Board.<sup>1</sup> The amended plan  
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24 <sup>1</sup> The 2001 Closure Plan was submitted to (1) Napa and Yolo Counties in support of  
25 their approval of the mine's entry into Use Permit Phase III B, Post Mining Reclamation  
26 and Monitoring of Reclaimed Areas, (2) Lake County in support of its approval of an  
27 amendment to the approved Reclamation Plan for tailings closure, and (3) Regional Water  
Quality Control Board in support of its approval of revised Waste Discharge Requirements  
for the closure of mine waste units. 2001 Closure Plan, at 8.

1 reflected the many years of operating the mine and tailings facility. In the amended plan,  
2 Homestake proposed to maintain the tailings impoundment as a zero-discharge facility and  
3 reclaim the area as a mixture of wetlands and grassland habitats rather than as a dry closure  
4 plan as had been proposed under the previously approved Reclamation Plan. 2001 Closure  
5 Plan, at 30-35.

6 Homestake's submission of the 2001 Closure Plan to the Regional Board was  
7 pursuant to the 2001 WDRs; the revised WDRS implemented the prescriptive standards of  
8 Title 27 of California Code of Regulations. 2001 WDRs, ¶ 35. As discussed above in  
9 Section 4b, based upon the input of the Regional Board and the Office of Mine  
10 Reclamation, Homestake withdrew its application for an amendment to its reclamation and  
11 closure plan from formal review and conducted the many studies to address the concerns  
12 raised by the agencies, meeting periodically with the Regional Board staff to present the  
13 studies and seek Regional Board input.

14 Homestake last met with the Regional Board Staff in January 2005. Since that time  
15 Homestake has been working diligently to address the comments and supplement the  
16 Ecological Risk Assessment for the Mine Tailings Impoundment. Nevertheless, while this  
17 work was pending, the Regional Board determined that the 2001 Closure Plan did not  
18 comply with the mine waste regulations under Title 27 of the California Code of  
19 Regulations. It also adopted the comments provided by the DTSC-HERD in concluding  
20 that the wetlands pursuant to this closure plan would be toxic to wildlife. The Regional  
21 Board's November 8, 2005 Order required Barrick to submit a revised Closure Plan for the  
22 Mine Tailings Impoundment. Further, the Order directs Barrick to conduct an Ecological  
23 Risk Assessment for the Mine Pits, followed by a revised mine pits management plan that  
24 reflects the findings of the Ecological Risk Assessment.

1 II. STANDARD OF REVIEW

2 The California Supreme Court has held that:

3 A court will uphold the agency action unless the action is arbitrary,  
4 capricious, or lacking in evidentiary support. A court must ensure  
5 that an agency has adequately considered all relevant factors, and has  
6 demonstrated a rational connection between those factors, the choice  
7 made, and the purposes of the enabling statute. California Hotel and  
Motel Assoc. v. Industrial Welfare Commission, 25 Cal. 3d 200, 212  
(1979).

8 In addition, pursuant to Water Code section 13320, in reviewing a decision of the  
9 Regional Board, the State Board is required to exercise an independent review of the  
10 Regional Board record and “any other relevant evidence.” Cal. Water Code § 13320. To  
11 uphold the challenged action of the Regional Board, the State Board must conclude that the  
12 action was “based on substantial evidence.” In re Exxon Co., U.S.A., Cal. St. Wat. Res. Bd.  
13 Order No. WQ 85-7, p.10, citing id.

14 Finally, under Water Code section 13267, the authority upon which the Regional  
15 Board relies for issuing this Order, the burden, including costs, of providing any technical  
16 reports and information required must bear a reasonable relationship to the need for the  
17 report and the benefits to be obtained from the reports. This section also requires the  
18 Regional Board to provide a written explanation of the need for the reports, and shall  
19 identify the evidence that supports requiring that person to provide the reports. Cal. Water  
20 Code § 13267(b)(1).

21 Homestake asserts that the Regional Board’s Order violates each of these standards.

22 III. THE REGIONAL BOARD IMPROPERLY REFUSED TO APPROVE  
23 HOMESTAKE’S SEPTEMBER 2001 CLOSURE PLAN AND THE  
24 REGIONAL BOARD’S REQUIREMENT FOR AN ALTERNATIVE  
25 CLOSURE PLAN IS ARBITRARY AND CAPRICIOUS.

26 In the 2001 Closure Plan, Homestake proposed to maintain the Tailings  
27 Impoundment as a zero-discharge facility and reclaim the area as a mixture of wetlands and  
28

1 grassland habitats. Homestake has conducted studies and submitted technical reports<sup>2</sup>  
2 showing that constructing a dry cover at the Tailings Impoundment is infeasible and the  
3 modified closure plan would protect water quality just as well as the approach previously  
4 proposed in the original reclamation plan.. Nevertheless, the Order rejects the 2001 Closure  
5 Plan on two grounds. First, the Regional Board asserts that a “wet” closure does not satisfy  
6 the technical requirements Title 27. Second, the Regional Board asserts that the wet closure  
7 is not protective of water quality and poses unacceptable ecological risks. Order at 1.

8  
9 The relevant provisions of the California Code of Regulations allow the use of an  
10 engineered alternative for closure when the prescriptive requirements are infeasible and the  
11 alternative can provide equivalent protection of water quality. Homestake is proposing to  
12 close the Tailings Impoundment as wetlands because (1) it is infeasible and practically  
13 impossible to construct a dry cover at the facility, as provided in the prescriptive  
14 requirements, and (2) the wetlands closure would provide at least the same water quality  
15 protection as the prescriptive requirements.

16 **Feasibility Standards.** California law requires environmental regulatory agencies  
17 to consider economic and technological feasibility as factors in assessing the adequacy of  
18 steps required for protection of state waters.. Water Code section 13263 requires Regional  
19 Boards to take into consideration the beneficial uses to be protected, the water quality  
20 objectives reasonably required for that purpose, other waste discharges, the need to prevent  
21 nuisance, and the provisions of § 13241 when establishing effluent limits in a waste  
22 discharge permit. Water Code section 13241 requires each Regional Board to consider a  
23 number of factors in establishing water quality objectives, including (a) past, present, and  
24 probable future beneficial uses of water, (b) environmental characteristics of the

25 <sup>2</sup> Homestake submitted the following reports as appendices in the September 2001  
26 Closure Plan: (1) Pit Lake and Tailings Facility Ecological Review; (2) Tailings  
27 Impoundment Water Balance Model; (3) Tailings Disposal Facility, Alternative  
Engineering Analysis. Homestake submitted the additional technical analyses referenced in  
Section 4b in January 2005.

1 hydrographic unit under consideration, including the quality of water available thereto, (c)  
2 water quality conditions that could reasonably be achieved through the coordinated control  
3 of all facts which affect water quality in the area, (d) *economic considerations*, (e) the need  
4 for developing housing within the region, and (f) the need to develop and use recycled  
5 water.

6 State Board regulations governing mine waste management also have specific  
7 provisions requiring the Regional Board to consider feasibility and cost effectiveness in  
8 assessing alternatives when imposing water quality objectives.<sup>3</sup>

9 Applicable State Board regulations expressly authorize engineered alternatives to  
10 the construction or prescriptive standards if the discharger demonstrates that (1) the  
11 construction or prescriptive standard is not feasible, and (2) the alternative is consistent  
12 with the performance goal and affords equivalent protection against water quality  
13 impairment. 27 Cal. Code Regs. § 20080(b). To establish that the prescriptive standard is  
14 not feasible, one must show that it is (1) unreasonably and unnecessarily burdensome and  
15 will cost substantially more than the proposed alternative, or (2) impracticable and will not  
16 promote attainment of applicable performance standards. 27 Cal. Code Regs § 20080(c).  
17 The regulations also provide that, in assessing feasibility, the Regional Board must consider  
18 all relevant technical and economic factors including present and projected costs of  
19 compliance, potential costs of remediation, and the extent to which groundwater resources  
20 could be affected. Id.

21 **McLaughlin Mine Closure Options.** Homestake's asserts that the prescriptive  
22

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23 <sup>3</sup> Generally, mine waste management regulations promulgated by the State Water  
24 Resources Control Board (SWRCB) are found in 27 Cal.Code Regs. §§ 22470 through  
25 22510 (Article 1 of Subchapter 1 of Chapter 7). The general applicability provision (§  
26 22470) provides that the regulations under Article 1 apply to all discharges of mining  
27 wastes; no SWRCB-promulgated parts of the Consolidated regulations for treatment,  
storage, processing, or disposal of solid waste (Subdivision 1 of the Solid Waste Division,  
i.e. § 20005 et seq.) apply to mining waste except those in that article, Article 1 of Chapter  
1 (i.e. § 20080 et seq.), and provisions of other articles as specifically are referenced in that  
article apply to discharge of mining wastes.

1 requirements of the regulations for closure of the tailings pond are “infeasible” under  
2 Section 20080(c). As presented in the 2001 Closure Plan and, as supported with subsequent  
3 technical reports, the prescriptive closure could not be constructed for an excessive period  
4 of time, would require a vastly larger volume of soil for cover (with attendant  
5 environmental impacts), would be subject to a risk of failure due to naturally occurring  
6 hydrologic and seismic conditions in the area, and would cost substantially more than the  
7 proposed alternative, while providing no greater protection for water quality.

8         In order to allow grading and placement of a dry cover under these circumstances, it  
9 first would be necessary to remove the tailings from the pond so as to allow them to dry  
10 sufficiently—to support construction equipment as well as the cover itself. 2001 Closure  
11 Plan, Appendix 15, (“Alternative Engineering Analysis”), at 5-6. However, in the initial  
12 permitting of the McLaughlin Mine, the Regional Board did not require that the Tailings  
13 Impoundments be lined (in fact the Regional Board exempted the Mine Tailings  
14 Impoundment from liner leachate collection and removal system requirements. 2001  
15 WDRs, ¶ 18. Accordingly, there is a significant flow of water into the impoundment from  
16 natural springs and seeps below the tailings. This upward movement of spring water in the  
17 area will cause sufficient free liquid to remain in the tailings, causing the continuing risk of  
18 liquefaction, especially when construction equipment is operated on the tailings surface or  
19 during seismic events. Alternative Engineering Analysis, at 7.

20         Engineering studies submitted in support of the 2001 Closure Plan conclude that the  
21 Mine Tailings Impoundment could not be closed with a prescriptive cover for at least a  
22 decade and possibly longer. Id. at 6. In addition, the prescriptive closure would require  
23 over 1,500,000 cubic yards of fill, which would require substantial disturbance of the  
24 adjacent and presently undisturbed land from which the fill would be obtained. Id. In  
25 contrast, the proposed alternative would only require 330,000 cubic yards of fill, already  
26 available on nearby land. Id.

27         Second, Homestake has shown that the alternative will afford at least equivalent  
28

1 protection against water quality impairment. In fact, the engineering studies show that  
2 there may be more risk of water quality impairment associated with the prescriptive closure.  
3 Id. at 7. The issue of concern is not surface or groundwater impact during regular  
4 operation. The impoundment was constructed without a liner with Regional Board  
5 concurrence because the permitting authorities recognized that there would be no risk to  
6 groundwater from the Mine Tailings Impoundment. Likewise, the mine tailings dam has  
7 prevented any discharge of tailings downstream during 20 years of operation. 2001 Closure  
8 Plan, at 33.

9  
10 The Regional Board has expressed concern over the wet closure regarding the  
11 potential for dam failure during a seismic event. However, in any case, a prescriptive dry  
12 cover would be likely to fail during a seismic event, leading to a loss of containment.  
13 Alternative Engineering Analysis, at 7. In addition, regardless of the dry cover, the  
14 continuous upward movement of spring water in the area would cause the tailings in the  
15 impoundment below the cover to remain saturated and could lead to seepage through the  
16 cover. Id. On the other hand, Homestake's engineering studies show that these problems  
17 would not arise or at least would be minimized if the wet cover alternative reflected in the  
18 2001 Closure Plan were used instead. Id.

19 The Order states that the proposed "wetlands" is an inappropriate closure method  
20 for the tailings impoundment and suggests that the Regional Board Staff would not approve  
21 anything other than a "dry" cover. It is improper for the Regional Board to make such a  
22 sweeping conclusion without considering the data and additional information Homestake is  
23 preparing for submission in response to the Staff's January 2005 comments.

24 In a very similar case, the State Board confirmed that closure of a facility as  
25 wetlands may be a reasonable engineered alternative to the prescriptive cover approach.  
26 See In re Meridian Beatrack Company et al, Cal. St. Wat. Res. Bd. Order WQO 2004-0007  
27



1 (“Royal Mountain King Order”). In that case, Petitioners had submitted amendments to  
2 their previous closure plans for the mine facilities to the Regional Board. The closure  
3 amendments included creation of wetlands downgradient from the overburden disposal sites  
4 to contain the discharges and allow for natural attenuation.  
5

6 The Regional Board rejected the amended closure proposal because it did not  
7 provide for installation of a clay cover, which was required for a Class B waste site. In  
8 directing the Regional Board to work with the petitioners to design and implement an  
9 alternate approach, the State Board first pointed out that, while the Regional Board was  
10 requiring compliance with the regulations requiring a clay cover/cap, the regulations  
11 actually required both a clay cover/cap and a clay liner. Royal Mountain King Order at 15.  
12 The State Board noted that requiring the prescriptive cover but not the clay liner would not  
13 prevent groundwater infiltration. Id. The State Board then discussed the estimated costs to  
14 comply with the regulations<sup>4</sup> and concluded that it was appropriate to require further  
15 consideration of alternate means “in view of the limited effectiveness of installing a clay  
16 cover ... to achieve partial compliance with the ... regulations, and the high cost of covering  
17 a large area with a clay cover meeting prescribed standards.” Id. The State Board also  
18 concluded that development of a plan to improve water quality through use of enhanced and  
19 expanded wetland and riparian areas should be given higher priority. Id. at 16.  
20  
21

22 The facts here closely mirror those for Royal Mountain King. Here, the Regional  
23

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24 <sup>4</sup> In the Royal Mountain King case, the cost of installing a cover over the overburden  
25 disposal sites pursuant to Title 27 requirements was estimated to be approximately \$30  
26 million. Isolation of the overburden disposal sites from groundwater inflow would require  
27 installing extensive subsurface cutoff walls or removing about 50 million tons of stockpiles.  
Relocating 50 millions tons of mining waste to allow for installation of a liner would cost  
approximately \$100 million, and the cost of actually installing the liner would be many  
million dollars more. Royal Mountain King Order at 11-12.

1 Board had previously exempted the mine tailings impoundment from prescriptive  
2 requirements for installation of liners and leachate collection and removal systems at the  
3 McLaughlin Mine. Requiring Homestake to build a dry cover on this impoundment  
4 without the accompanying underlying liner and collection and removal systems at this point  
5 in the life of the facility, would not only be prohibitively expensive and difficult, if not  
6 impossible, to construct, but would not prevent groundwater infiltration any better than a  
7 wetland closure. Accordingly, the Regional Board should have at least given Homestake  
8 the opportunity to complete the development of the technical information and support for  
9 its wet closure proposal to demonstrate that it will ensure protection of water quality. The  
10 Regional Board's rejection of the very concept of an alternative to "dry" closure under  
11 these circumstances is arbitrary, premature and improper.  
12  
13  
14

15 IV. THE REGIONAL BOARD'S ORDER TO SUBMIT A COMPLETE  
16 ECOLOGICAL RISK ASSESSMENT AND REVISED MANAGEMENT  
17 PLAN FOR THE MINE PITS IS ARBITRARY AND CAPRICIOUS.  
18

19 In addition to requiring a revised closure plan for the Tailings Impoundment, the  
20 Order also requires the submission of an Ecological Risk Assessment Work Plan for the  
21 Mine Pits, complete a full ecological risk assessment for these areas and submit a revised  
22 management plan for the Mine Pits consistent with the findings of the risk assessment.  
23 Such requirements are arbitrary and capricious.

24 The Order states that the Regional Board has mandated the ecological risk  
25 assessment for the Mine Pits out of concern regarding monitoring data from the South Mine  
26 Pit and because "DTSC-HERD has expressed concern that the pit waters may be an  
27 ecological hazard to wildlife." Order at 2. However, the Regional Board has provided no  
28 documentation of DTSC-HERD's concerns or any other site-specific information that

1 would justify the imposition of these significant requirements. This is of particular concern  
2 given that the Regional Board has not identified a threat to surface water from the Mine Pits  
3 and had stated that there is no useable groundwater aquifer at the McLaughlin Mine. Id.

4 The only documentation of concerns raised by DTSC-HERD relates to the Mine  
5 Tailings Impoundment. The Regional Board has provided no basis for requiring a risk  
6 assessment for the Mine Pits areas when the DTSC-HERD only commented on the tailings  
7 pond. Thus, there is virtually no evidentiary support for the Regional Board's  
8 determination that the prior ecological assessment offered by Homestake is inadequate and  
9 that a full ecological risk assessment is necessary.  
10

11 V. THE TIMELINES FOR REPORT SUBMITTAL ARE UNREASONABLE  
12 AND IMPROPERLY ADOPTED.

13 For all the reasons outlined above, it was unreasonable and improper for the  
14 Regional Board to order Homestake to develop a full alternative closure plan by March  
15 2005. The iterative process being followed by Homestake is essential to developing a  
16 closure plan that will in fact be feasible, and in fact protect the water quality at and around  
17 the site from potential contamination from the tailings impoundment, both now and in the  
18 future. Even without the additional obligations regarding an ecological risk assessment of  
19 the Mine Pits, and possible modification of the closure plan for those Pits, it is patently  
20 unreasonable to expect Homestake, at the risk of daily penalties, to produce a quality  
21 amended closure plan that would meet those standards. Combined with the additional  
22 obligations under the Order with respect to the Mine Pit closure, achievement of those  
23 milestone dates is impossible, a fact that could have been easily determined by  
24 communicating with Homestake prior to issuance of the Order.  
25

26 For all of the foregoing reasons, the Regional Board's imposition of requirements in  
27 the Order is arbitrary, capricious, and contrary to law. Petitioners request that the State  
28 Board hold this appeal in abeyance pending the outcome of further meetings with the

1 Regional Board and staff. In the event that it becomes necessary to pursue this appeal,  
2 Petitioners request a hearing in this matter and reserves the right to request an opportunity  
3 to present additional evidence and analysis of these issues that might come to light or  
4 otherwise become pertinent as a result of those discussions. Further, Petitioners reserve the  
5 right to request a stay of the Order should it become necessary to pursue this appeal.  
6

7 Dated: December 8, 2005

8 PILLSBURY WINTHROP LLP  
9 WAYNE M. WHITLOCK #130163  
GERALD F. GEORGE # 142573  
10 2550 Hanover Street  
Palo Alto, California 94304-1115

11  
12 By

  
13 Attorneys for Petitioners  
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